

Message Text

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SUBJ: GOS REPLY ON CHARGES ON U.S. MILITARY CARGOES

REF: MADRID 6840

1. SPANISH HAVE PRESENTED PERMANENT SECRETARIAT NOTE DATED DECEMBER 11, 1973, SPELLING OUT IN DETAIL GOS POSITION ON OBLIGATION OF U.S. FORCES OR THEIR CONTRACTORS TO PAY PORT USAGE CHARGE (G-3 TARIFF) ON CARGOES ENTERING SPAIN THROUGH PORT OF CADIZ. U.S. MEMBERS OF PERMANENT SECRETARIAT HAVE INFORMED SPANISH THAT QUESTION OF U.S. FORCES' LIABILITY FOR G-3 TARIFF SHOULD BE AGENDA ITEM FOR NEXT JOINT COMMITTEE MEETING NOW SCHEDULED FOR MARCH 5.

2. FOLLOWING IS TEXT OF INFORMAL TRANSLATION OF SPANISH NOTE:

BEGIN TEXT: SUBJECT: PAYMENT BY THE U.S. FORCES OF THE G-3 TARIFF FOR LOADING, UNLOADING AND TRANSHIPMENT IN SPANISH PORTS.

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WITH REFERENCE TO THE PROBLEM STEMMING FROM THE REQUIREMENT

TO PAY SUBJECT TARIFFS, ESPECIALLY IN THE PORT OF CADIZ, THE FOLLOWING IS POINTED OUT.

THE OBLIGATION TO PAY THESE TARIFFS IS DERIVED FROM THE DISPOSITIONS OF LAW 1/1966 OF 28 JANUARY CONCERNING THE FINANCIAL ADMINISTRATION OF SPANISH PORTS.

WHETHER THEY ARE CONSIDERED AS RATES OR TARIFFS, PAYMENT IS MANDATORY. ACCORDING TO THE LAW ON PARAFISCAL TAXES AND LEVIES OF 26 DECEMBER 1958, MONIES WHICH CAN BE LEGALLY EXACTED AS PAYMENT FOR THE RENDERING OF A SERVICE, FOR THE USE OF GOVERNMENT PROPERTY OR FOR THE DEVELOPMENT OF AN ACTIVITY WHICH AFFECTS THE PARTY BENEFITTED IN A PARTICULAR MANNER, ARE CONSIDERED RATES.

ARTICLE 7 OF CHAPTER II, ENTITLED "TARIFFS FOR SERVICES" OF THE ABOVE-MENTIONED LAW ON FINANCIAL ADMINISTRATION RULES FOR PORTS ENUMERATES THOSE SERVICES RENDERED BY PORT AGENCIES. THESE SERVICES ARE CLASSIFIED AS SPECIFIC AND GENERAL, AND INCLUDED IN THE LATTER ARE SUCH GENERAL SERVICES AS LOADING, UNLOADING AND TRANSHIPMENT OF MERCHANDISE AND PASSENGERS. THIS LEADS TO THE CONCLUSION THAT THERE ARE SOME SERVICES SUCH AS CONSTRUCTION, ORGANIZATION AND OPERATION OF THE PORT WHICH DETERMINE THE APPROPRIATE TARIFFS DUE.

IF CONSIDERED AS A SERVICE FEE THE G-3 TARIFF MUST BE PAID AS MUST ANY OTHER PAYMENT FOR USE OF ANY OTHER TYPE OF SERVICES.

IT DOES NOT APPEAR THAT THE GENERIC EXEMPTION IN ARTICLE XIX OF THE TECHNICAL AGREEMENT TO THE DEFENSE AGREEMENT INCLUDES ANY EXEMPTION OF TAXES FOR THE RENDERING OF SERVICES. THIS IS CORROBORATED BY THE FACT THAT INTERNATIONALLY, THOSE REQUESTS FOR CERTAIN SERVICES RENDERED FOR WHICH PAYMENT IS MANDATORY ARE EXCLUDED FROM THE TAX EXEMPTIONS. THIS CONCEPT WAS INCLUDED IN THE VIENNA CONVENTION ON DIPLOMATIC AND CONSULAR RELATIONS. THE APPLICABLE PROVISION MAKES THE PAYMENT OF SAID TARIFFS MANDATORY EVEN WHEN THE SERVICES ARE PROVIDED BY OR FOR THE SPANISH GOVERNMENT ITSELF, THE ONLY EXCEPTION BEING THAT PROVIDED FOR IN ARTICLE 13 OF THE ABOVE-MENTIONED LAW.

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IF CONSIDERED AS TARIFFS WHICH ARE REQUIRED FOR OPERATIONS AND SERVICES RENDERED IN SPANISH PORTS -- PROBABLY A MORE EXACT CLASSIFICATION -- THEY DO NOT HAVE THE NATURE OF A TAX IN THE LEGAL SENSE OF THIS TERM. IF PRIOR TO LAW 1/66 OF JANUARY 28 TARIFFS COULD BE CONSIDERED AS A TAX, THE SAME CANNOT BE AFFIRMED IN LIGHT OF THIS LAW. THE LEGAL CLASSIFICATION OF TARIFFS HAS GIVEN RISE TO CONTRARY INTERPRETATIONS WITHOUT THE QUESTION HAVING BEEN SETTLED IN A FINAL AND CON-

CLUSIVE MANNER. HOWEVER, SINCE THE ABOVE-MENTIONED LAW DOES NOT MAKE REFERENCE TO THE LAW ON PARAFISCAL TAXES AND LEVIES, NOR IS THE MONEY COLLECTED DEPOSITED IN THE TREASURY, IT IS APPROPRIATE TO CONCLUDE THAT THE CLASSIFICATION OF TARIFF IS THE MOST EXACT, ESPECIALLY SINCE, IN ACCORDANCE WITH THE MENTIONED LAW, TARIFFS ARE CONCEIVED AS A MEANS TO OBTAIN A REASONABLE BENEFIT FROM A NET INVESTMENT IN FIXED ASSETS, THIS CRITERION OF INCOME BEING INCOMPATIBLE WITH THE CONCEPT OF RATES.

ALSO, AS A TARIFF IT CANNOT BE INCLUDED IN THE CATEGORY OF TAXES, NO MATTER HOW BROADLY ARTICLE XIX OF THE ABOVE-MENTIONED AGREEMENT IS INTERPRETED.

IT IS OF INTEREST TO NOTE THAT THE MODIFICATION OF THE PORTS' FINANCIAL SYSTEM TOOK PLACE BECAUSE OF THE LOAN AGREEMENT WITH THE WORLD BANK WHICH IMPOSED THE NEED TO REGULATE MORE ADEQUATELY AND EFFECTIVELY THE INCOME REQUIRED FOR FINANCING OF THE PORTS.

THE LAW CITED ABOVE CORRESPONDS TO THE FOREGOING. ITS DECLARATION OF INTENT POINTS OUT THE NEED TO DETERMINE THE SOURCES OF FINANCING BOTH FOR OPERATING EXPENSES AS WELL AS FOR INVESTMENTS, FIXING THE LEVEL WHICH SHOULD BE ATTAINED BY CONTRIBUTIONS FROM THE PORT AGENCIES. ITS PROVISIONS ESTABLISH AS SOURCES FOR THIS FINANCING THE INCOME FROM TARIFFS FOR GENERAL AND SPECIFIC SERVICES.

IN SHORT, THE CONCEPT THAT THE PROCEEDS OF TARIFFS ARE A MEANS FOR THE FINANCING OF A SERVICE IS FUNDAMENTAL IN RESOLVING THE PROBLEM WHICH CONCERNS US. COUNTER TO THE IDEA OF A TAX IS THAT OF THE PAYMENT FOR A SERVICE. THE DISTINCTION SHOULD BE MADE IN ACCORDANCE WITH THE USE OF THE SERVICE. ALL TAXES

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ARE ESTABLISHED TO FINANCE SERVICES. THE QUESTION LIES IN THE INTERMEDIATE OR IMMEDIATE RELATION WHICH EXISTS BETWEEN THE PAYMENT AND THE SERVICE. WHEN THE PAYMENT ENTERS THE STATE TREASURY AND THE STATE PROVIDES THE SERVICE WITHOUT CONSIDERATION OF ITS USE BY THE PAYER, WE ARE SPEAKING OF A TAX. WHEN, TO THE CONTRARY, WE HAVE A PAYMENT WHICH DOES NOT GO INTO THE STATE TREASURY BUT RATHER IS DEPOSITED DIRECTLY IN THE ORGANIZATION IN CHARGE OF THE MAINTENANCE OF THE SERVICE, WE ARE SPEAKING OF A TARIFF, ESPECIALLY WHEN THE PAYMENT IS TO BE MADE BY THE PERSON WHO WILL DIRECTLY USE THE SERVICE FOR WHICH HE IS PAYING.

THIS IS THE CASE OF THE G-3 TARIFFS. THE PORTS ADMINISTER FUNDS WITH WHICH THEY FINANCE THE MAINTENANCE, CLEANING, SURVEILLANCE, CONSERVATION, ILLUMINATION, MARKERS, ETC.,

ETC., SERVICES WHICH ARE USED IN A DIRECT AND IMMEDIATE MANNER BY THOSE WHO CONDUCT OPERATIONS OF LOADING, UNLOADING AND TRANSHIPMENT. PAYMENT FOR THESE SERVICES CAN NEVER BE CONSIDERED A TAX FOR THE ABOVE-MENTIONED REASONS.

THE PROBLEM POSED AT THE PORT OF CADIZ SHOULD BE RESOLVED ON THIS BASIS, BY PAYING THE TARIFFS WHICH COME DUE INSBHE FUTURE AND DEPOSITING DEFINITELY THE AMOUNT OF 2,088,154 PESETAS ON DEPOSIT AT THE PRESENT TIME IN THE BANK OF BILBAO AT CADIZ PENDING THE DECISION OF THIS MATTER, AND BY NOT INVOKING ANY PRECEDENT, DRAWN FROM A PERIOD WHEN THE NATURE OF THE TAX WAS DIFFERENT AND BEFORE THE RESULTS OF THE WORLD BANK REPORT, TO AVOID A PAYMENT WHICH BOTH BY LAW AND BY ITS VERY NATURE MUST BE MADE BY ALL USERS OF SPANISH PORTS WITHOUT EXCEPTION. END TEXT.
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